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81-45

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In *re* GERALDINE G. CANNON,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

When this Court, in reversing a judgment of dismissal for failure to state a claim, has remanded a case for futher proceedings consistent with its opinion that "facts alleged in the complaints . . . . establish a violation of §901(a) of Title IX of the Education Amendments of 1972," 20 U.S.C. §1681 et seq. ("Title IX"), may the lower courts thereafter hold otherwise and again dismiss the same complaints for failure to state a claim under Title IX?

PARTIES

The other parties to the proceeding in respect of which relief is desired are The University of Chicago, Northwestern University and the individual members of their faculties named in the petition for a writ of certiorari previously granted by this Court. (Docket No. 77-926). After remand, the

federal respondents who had supported the position of petitioner in this Court were dismissed as parties by the district court. Later, in the court of appeals, the Department of Justice filed a brief and presented oral argument on behalf of the United States as amicus curiae, again supporting the position of petitioner, and emphasizing the validity of section 21(b)(2) of the Title IX regulations and the schools' contractual obligation to observe those regulations under their federal funding contracts. (See, p.9 infra).

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

In re

GERALDINE G. CANNON,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of mandamus issue to reverse the judgment and vacate the opinion of the United States Court of Appeals for the Seventh Circuit, which again affirmed the dismissal of complaints previously upheld by this Court in Cannon v. University of Chicago, 441 U.S. 677 (1979).

OPINIONS BELOW

The opinion of the court of appeals was reported at 49 U.S. Law Week 1187 and 2755, and is set out in the attached appendix. (pp.1a-13a). The opinion of the district court was delivered orally by Senior Judge Julius J. Hoffman and has not been reported.

JURISDICTION

The judgment of the court of appeals is dated May 6, 1981. A timely petition for rehearing and suggestion for rehearing in banc was denied on June 22, 1981. This Court has jurisdiction under 28 U.S.C. §1651(a) in aid of its appellate jurisdiction previously exercised under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In 1975, Petitioner brought civil rights actions alleging that she was denied admission to the federally-

assisted medical education programs of The University of Chicago and Northwestern University because she is a woman. Her complaints were dismissed by the district court for failure to state a claim upon which relief may be granted. The court of appeals affirmed. On certiorari to decide the question of private enforceability of Title IX, this Court reversed that judgment and stated in its opinion that,

> Only two facts alleged in the complaints are relevant to our decision. First, petitioner was excluded from respondents' medical education programs because of her sex. Second, these programs were receiving Federal financial assistance at the time of her exclusion. These facts, admitted arguendo by respondents' motion to dismiss the complaints, establish a violation of §901(a) of Title IX. (441 U.S. at 680).

The order of this Court remanded the case "for further proceedings consistent with this opinion." 441 U.S. at 717.

On remand in the district court, the schools renewed their motions to dismiss the complaints for failure to state a claim, this time asserting that the complaints did not allege "purposeful and intentional discrimination" against women. Judge Hoffman, stating that petitioner had obtained a "pyhrric victory" in this Court, granted the renewed motions and again dismissed the complaints for failure to state a claim under Title IX. The court of appeals affirmed, stating that this Court had "assumed arguendo the sufficiency otherwise" of the complaints. (App. p.4a).

REASONS FOR GRANTING THE WRIT

1. The action of the court of appeals disobeys and mistakes the meaning of this Court's mandate.

Repeated dismissal of the complaints for failure to state a claim under Title IX is not consistent with the opinion of this Court that the

"facts alleged in the complaints . . . . establish a violation of §901(a) of Title IX." 441 U.S. at 680. The dismissal conflicts with the judgment of this Court reversing the same prior judgment of the court of appeals, and disobeys the order of this Court remanding the case "for further proceedings consfstent with this opinion." 441 U.S. at 717.

When a lower court "disobeys and mistakes the meaning" of this Court's mandate, the proper remedy is a writ of mandamus. United States v. Fossatt, 61 U.S. (21 How.) 445, 446 (1859), Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425, 427 (1978).

The court of appeals asserted that this Court had "assumed arguendo the sufficiency otherwise" of the complaints in order to reach the private right of action question presented by petitioner.

(App. p.4a)./1 This was plain error. The opinion of this Court stated only that the "truth" of the "facts alleged in the complaints" was "admitted arguendo by respondents' motion to dismiss." 441 U.S. at 680. If the schools believed they had "substantial grounds not previously presented" to this Court in reversing the prior judgment, their sole remedy was a petition for rehearing under Rule 51 of this Court.

In this case there is no need to speculate on what this Court "assumed" for two reasons. First, the opinion of the Court stated, without qualification, that petitioner's allegations "admitted arguendo by respondents' motion to dismiss the complaints, establish a violation of §901(a) of Title IX."

/1 This Court has been expressly critical of the need to decide so many private right of action cases. See e.g., Touche Ross v. Reddington, 442 U.S. 560, 562, at n.1 (1979).

Second, the dissenting opinion of Justice Powell specifically noted the requirement for purposeful discrimination, on which the schools and the courts below focused after remand. 441 U.S. at 748 n.19./2 Accordingly, the court of appeals was wrong to hold that this Court "did not consider" the matter. (App. p.4a).

2. The relief sought is not available in any other court.

Following the renewed dismissal by the district court on May 23, 1980, the

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/2 On remand, the courts below expressly refused to reach the schools' alternative motions for summary judgment which were based on petitioner's academic qualifications noted by Justice Powell in questioning her chances of proving purposeful discrimination. Affidavits expressly recognized that,

"both schools admitted some persons to the classes to which she applied despite the fact that those persons had less impressive objective qualifications than she did,"

as the opinion of the Court had noted. (414 U.S. at 680 n.2).

court of appeals denied an emergency petition for a writ of mandamus (May 30, 1980) without prejudice to raising the propriety and correctness of the dismissal on an expedited appeal. On the expedited appeal it affirmed the dismissal (May 6, 1981) and denied a petition for rehearing and suggestion for rehearing in banc (June 22, 1981). Accordingly, the relief sought is not available in any other court.

3. Alternative relief is not available in any other court.

When the district court did not promptly strike the renewed motions to dismiss, petitioner was aware that leave to amend complaints "shall be freely given." Rule 15(a), F.R.Civ.P., and offered "willingly" to amend the complaints with allegations that the "purpose" and "intent" of the schools' age policies was to discriminate against women.

Throughout this litigation, petitioner has sought to prove that the purpose of the schools' age policies was to exclude women and that she was excluded "because of her sex." 441 U.S. at 680./3

The opinion of the court of appeals limited the power of the Federal Government to fix the terms on which its money allotments shall be disbursed (App. pp.4a-10a), summarily invalidated section 21(b)(2) of the Title IX regulations (App. p.11a n.4), and expressly refused to follow the decision of this Court in Lau v. Nichols, 414 U.S. 563 (1974) (App. pp.5a- 9a). Denial of petitioner's motion to amend the complaints conflicts with the decision of

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3/ See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 265, 279 (1979), for contemporaneous use of the "because of" language in a Fourteenth Amendment case.

this Court in Foman v. Davis, 371 U.S. 178 (1962).

These matters, of course, may be urged in support of a petition for a writ of certiorari. But that would cost petitioner at least another year in pursuing the right to litigate her 1975 exlusion by the schools on the ground that she then was over-age. Petitioner has explored every reasonable alternative to the extraordinary writ of mandamus, and submits that alternative relief is not available in any other court.

CONCLUSION

For the reasons stated above, a writ of mandamus should issue to reverse the judgment and vacate the opinion of the court of appeals.

Respectfully submitted,

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July 1, 1981

APPENDIX

Opinion of court of appeals
filed May 6, 1981

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1763

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,
and NORTHWESTERN UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75 C 2724—**Julius J. Hoffman**, *Judge.*

ARGUED SEPTEMBER 24, 1980—DECIDED MAY 6, 1981

Before PELL, *Circuit Judge*, SKELTON, *Senior Judge*,* and WOOD, *Circuit Judge.*

PELL, *Circuit Judge.* Plaintiff-appellant Geraldine G. Cannon comes before this court for a third time in her effort to gain admission to the defendants' medical schools. She was denied admission for the 1975 academic year and has been involved in litigation over the denials at all levels of the federal judiciary since that time. In her complaints, appellant claimed that the defendants' failure to admit her violated the age and sex discrimination prohibitions of the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871,

* Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

42 U.S.C. § 1983, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and Illinois law, Ill. Rev. Stat. ch. 48 § 884 *et seq.* The Title IX allegations are the only viable allegations remaining. Initially, the defendants moved to dismiss those allegations pursuant to Fed.R.Civ.P. 12 (b)(6) on the ground that no private right of action existed under Title IX. The district court granted these motions, 406 F.Supp. 1257 (N.D. Ill. 1976), and this court affirmed, 559 F.2d 1063 (7th Cir. 1976). After reviewing the case upon a petition for certiorari, the Supreme Court reversed, holding that a private right of action was implied under Title IX. 441 U.S. 677 (1979). Upon remand to the district court, the defendants filed renewed Rule 12(b)(6) motions to dismiss the complaints, this time on the ground that Title IX prohibits only intentional discrimination and that appellant had failed to allege such purposeful conduct by the defendants in her complaints. Following the denial of appellant's motion for a preliminary injunction which was affirmed by this court, the district court granted defendants' renewed motions to dismiss and denied appellant's cross-motions to strike. Appellant's present appeal is from those orders.

I

The factual background of this case has been set forth in the earlier opinions of the district court and this court. A short repetition, however, may be of some assistance.

The present appellees, Northwestern University Medical School and the Pritzker School of Medicine at The University of Chicago, were two of the ten medical schools to which appellant unsuccessfully applied in 1975. Her undergraduate grade point average (GPA) in science and math related courses was 3.17 of a possible 4.00. The average GPA in these courses of the accepted applicants at the Pritzker School was 3.70 and at least 50% of all applicants to Northwestern had higher GPAs than appellant. On the science portion of the medical college admission test, appellant scored in the lower half of the applicant group to the defendant schools. On the quantitative portion of the test, she scored in the bottom

half of the applicants to Northwestern and in the bottom 20% of the applicants to the University of Chicago.

In 1975, only 110 of over 6700 applicants were accepted at Northwestern while only 104 of 5427 applicants were accepted at Chicago. The Dean of the Pritzker School stated in an affidavit that at least 2000 applicants with better academic qualifications than appellant were rejected. At Northwestern, only seven applicants with lower academic qualifications were admitted: five blacks and two women. During the period from 1971 to 1975, 18.1% of the applicants to the Pritzker school were women while 18.3% of the entering classes were women, and 2.2% of all women applicants were admitted while 2.1% of all male applicants were admitted.

Appellant's suits, which were consolidated in the district court's dismissal, are based upon the admission policies of the defendant schools which in 1975 either discouraged individuals over the age of 30 from applying, or, in the case of Northwestern, prohibited the admission of any applicant over the age of 35 who did not possess an advance academic degree. At the time of her application, appellant was 39 years old and had no such degrees. She asserts that because women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than men, these age policies disparately affected women. Appellant claims that the defendants' age policies therefore resulted in sexual discrimination violative of Title IX.[1]

[1] Appellant's argument on this issue is somewhat confused. It is clear from the district court's opinion given orally in court that the primary issue before it was the proper standard to be imposed under Title IX; *i.e.*, whether that statute could be violated by disparate impact alone. In her brief to this court, however, appellant maintains that the district court's holding that the constitutional (intentional) standard applied was "premature" because she "propose[d] to meet the constitutional standard" in the district court. Only as a secondary argument here does the appellant assert that a disparate impact alone is sufficient to violate Title IX. We shall approach the problem as did the district court and first address whether the intentional-conduct standard applies under Title IX.

II

Before we proceed to discuss the central issue on this appeal, that is, whether Title IX incorporates an intentional discrimination test or a disparate impact test, we must first address appellant's argument that the Supreme Court decided finally the issue before us now in its previous decision in this case. Appellant asserts that because the Court reversed the prior dismissal of her complaints granted on the ground that she failed to state a claim, the Court implicitly found her complaints to be adequate for the purposes of all further Rule 12(b)(6) motions.

This contention may quickly be dismissed. The only issue before the Supreme Court on the prior appeal in this case was whether Title IX implied a private right of action. The Court did not consider any other potential ground for dismissal of appellant's complaints in its opinion. This was made clear in the opinion of Justice Stevens for the Court:

> Accepting the truth of [appellant's] allegations for the purposes of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in the federal court. 559 F.2d 1063. We granted certiorari to review that holding. 438 U.S. 914

Cannon v. The University of Chicago, 441 U.S. 677, 680 (1980) (footnote omitted). The fact that the Supreme Court and this court assumed *arguendo* the sufficiency otherwise of appellant's complaints for the purposes of the prior appeal does not disallow the appellees' attack on those assumptions here.

III

Addressing the merits of the district court's opinion, we note that the Supreme Court in *Cannon* indicated that we should look to Title VI for guidance regarding

the proper interpretation of Title IX.[2] 441 U.S. at 694-96. Looking to Title VI, it appears that in the past it has been assumed to apply the disparate impact test. This was the result of the Supreme Court's action in *Lau v. Nichols*, 414 U.S. 563 (1974), upholding certain regulations promulgated by HEW under Title VI. The regulations provided that school systems receiving federal financial assistance "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination," or have "the effect of defeating or substantially impairing accomplishment of the objectives of the programs as respects individuals of a particular race, color, or national origin." 414 U.S. at 568, *quoting* 45 C.F.R. § 80.3(b)(2). In the opinion by Justice Douglas, the Court noted that the defendant school district had "contractually agreed to 'comply with Title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the Regulation' of HEW (45 C.F.R. Part 80) which are 'issued pursuant to that title . . .'" 414 U.S. at 568-69, and concluded that "[w]hatever may be the limits of [the Federal Government's power to fix the terms on which its money allotments to the States shall be disbursed] . . ., they have not been reached here." *Id.* at 569 (citations omitted). The Court therefore reversed a court of appeal's holding that no relief was available under the regulations.

The implication in *Lau* that the disparate impact or effects test applied under Title VI became subject to question by the later language in *Board of Regents v.*

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[2] Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

Title IX, 20 U.S.C. § 1681, provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance. . . .

Bakke, 438 U.S. 265 (1978). In that case where the Supreme Court invalidated an affirmative action special admissions program at the University of California Medical School, Justice Powell was of the opinion that Title VI should be held to impose the intentional discrimination standard. After discussing the legislative history of Title VI, he concluded:

> In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment.

438 U.S. at 287. A violation of the Equal Protection clause had previously been held to require a finding of intentional discrimination; disparate impact alone will not support a cause of action under the Constitution. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976).

Though the dissenters in *Bakke* felt that the affirmative action program at the University should have been upheld, the opinion by Justice Brennan joined in by Justices White, Marshall and Blackmun concurred in Justice Powell's statement that the constitutional standard applied under Title VI:

> We agree with Justice Powell that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection clause of the Fourteenth Amendment itself.

438 U.S. at 325

> In our view, Title VI prohibits only the uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; . . ."

Id. at 328. The dissenters later expressly questioned the continued viability of the *Lau* implications after the *Bakke* decision:

> We recognize that *Lau* when read in light of our subsequent decision in *Washington v. Davis*, 426 U.S. 229 (1976), which rejected the general proposi-

> tion that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least in some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.

Id. at 352.

In a recent Supreme Court opinion, Justice Marshall, joined by Justice Brennan and Justice Blackmun, concurred and expressed similar sentiments:

> In *Bakke*, five members of the Court were of the view that the prohibitions of Title VI—which outlaw racial discrimination in any program or activity receiving federal financial assistance—are coexistent with the Equal Protection guarantees of the Fourteenth Amendment.

Fullilove v. Klutznick, 48 U.S.L.W. 4979, 4998 n.1 (July 2, 1980). Similarly, in *Board of Education v. Harris*, 444 U.S. 130 (1979), the Court clearly indicated that *Lau* is not dispositive of the issue of the standard under Title VI. In that case, the Court held that certain sections of the Emergency School Aid Act (ESAA) incorporated the disparate impact standard for testing illegal racial discrimination. When addressing the Board's argument that because Title VI required intentional discrimination for a violation so should the ESAA, the Court stated:

> There is . . . no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard. See *University of California Regents v. Bakke*, 438 U.S. 265 (1978). Consideration of that issue would be necessary only if there were a

positive indication either in Title VI or in ESAA that the two Acts were intended to be coextensive.

Id. at 149.

* * *

It does make sense to us that Congress might impose a stricter standard under ESAA than under Title VI of the Civil Rights Act of 1964. A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when the discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when the ESAA violation is found.

Id. at 150.

ESAA was an attempt by Congress to bring about the same remedy without regard to the cause of the problem, while Title VI may have been intended to remedy the problem only when its cause was intentional discrimination.

Id. at n. 13.

The dissent in *Board of Education* by Justice Stewart with Justices Powell and Rhenquist joining, also assumed that the *Lau* implication was not good law on this point. The Justices expressed the opinion that the intent standard should apply alike to the ESAA and Title VI. When addressing the majority's argument that the legislative history of § 703 of the ESAA, the so-called Stennis Amendment, indicated that the section was to impose only the disparate-impact test, Justice Stewart stated:

My difficulty with this reasoning stems from the fact that the Stennis Amendment is applicable not only to ESAA, but also to Title VI of the Civil Rights Act of 1964, and the latter has been construed to contain not a mere disparate-impact standard, but a standard of intentional discrimination. In *University of California Regents v. Bakke*, 438 U.S. 265, five members of the Court concluded that Title VI, which prohibits discrimination in federally funded programs, prohibits only discrimination

violative of the Fifth Amendment and the Equal Protection Clause of the Fourteenth. *Id.* at 281-287 (Powell, J.); *id.* at 325-355 (Brennan, J., White, Marshall, and Blackmun, J.J.). Those constitutional provisions, in turn, have been construed to reach only purposeful discrimination. *Dayton Board of Education v. Brinkman*, 433 U.S. 406; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252; *Washington v. Davis*, 426 U.S. 229; *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189. It thus follows from *Bakke* that Title VI prohibits only purposeful discrimination.

Id. at 159-60, *and see id.* at 162.

It would seem from the above quoted language that seven of the Justices of the Supreme Court support the view that a violation of Title VI requires intentional discrimination.[3] We agree that this is the better view and other courts are in accord. In *Parents Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705 (2d Cir. 1979), for example, the court noted that at least in school discrimination cases, Title VI should be held to impose the intentional discrimination standard. The court distinguished its earlier opinion in *Board of Education of New York City v. Harris*, 584 F.2d 576 (2d Cir. 1978), *affirmed on other grounds*, 444 U.S. 130 (1979), where it had held that Title VI was violated by disparate impact alone in an employment discrimination context. The court noted that the earlier opinion had relied upon an analogy to Title VII which had been held to impose the disparate impact test, but decided that in the school case, the proper analogy would be to Title IV which by its terms imposed the higher intentional dis-

[3] The three Justice plurality opinion in *Fullilove v. Klutznick*, 48 U.S.L.W. 4979 (1980), does not alter this conclusion. In *Fullilove*, the Chief Justice cited *Lau* as an example of a broad interpretation of Congress' power to remedy discrimination. The citation does not serve as a reaffirmance of the *Lau* implications at issue here especially since Justice Burger's opinion was joined in by Justices Powell and White who expressed the view in *Bakke* that Title VI imposes the intentional discrimination standard.

crimination standard. 598 F.2d 716, *see* 42 U.S.C. § 2000c-6. The court held, therefore, that the higher standard ought to apply under Title VI in the school discrimination area. In agreement is the detailed opinion in *Bryan v. Knoch*, 492 F.Supp. 212, 229-33 (S.D.N.Y.), *affirmed*, 627 F.2d 612 (2d Cir. 1980), where the court held that the closing of a city hospital must be shown to have been intentionally discriminatory to be a violation of Title VI, *Lora v. Board of Education*, 623 F.2d 248, 250 (2d Cir. 1980), which held that the assignment of handicapped children to special schools must be shown to be intentionally discriminatory to violate Title VI, and *Harris v. White*, 479 F. Supp. 996, 1002 (D. Mass. 1979), which held the intent standard applied to a Title VI challenge to a city's employment practices. *Board of Education* discussed in *Parents' Association* and which relied upon *Lau* in reaching its conclusion that Title VI imposed the disparate impact test in the employment discrimination area, would not seem to aid significantly appellant's position here in light of the Supreme Court's distinguishing Title VI from the ESAA in its affirmance of the case, and the Second Circuit's narrowing of the *Board of Education* holding in *Parents' Association*.

In short, we believe that a majority of the Justices on the Supreme Court as well as other courts that have recently addressed this question in similar circumstances would hold that a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation. We shall therefore adopt that standard under Title IX and evaluate appellant's complaint accordingly.

IV

The complaints appellant filed in these actions contain no express allegations that her applications to the defendants' medical schools were purposefully or intentionally rejected because of her sex. It is clear from the text of her complaints that appellant's cause of action was based solely upon the alleged disparate impact the defendants' age policies had upon women. With regard to the Title IX claims, the complaints allege simply:

A material criterion for defendants' denial of plaintiff's application for admission to the September 1975 entering class at [the defendants'] Medical School[s] was her age which, in the circumstances of application to medical school, is a criterion disproportionately characteristic of her sex and does not validly predict any lack of success in the education program or activity of the school[s]. This conduct on the part of defendants is in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.*, as amended by Title IX of the Education Amendments of 1972, P. L. 92-318, § 901(a) which provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

and the specific regulations promulgated by the Department of Health, Education and Welfare thereunder, 45 C.F.R. § 86.21(b)(2) which provides:

> "A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criterion which do not have such a disproportionately adverse effect are shown to be unavailable."

This claim of disparate impact,[4] even when coupled with the allegations made in appellant's brief to this court that the defendants knew of this impact while enforcing their age policies, is insufficient to establish a violation of Title IX. *Personnel Administrator v. Feeney,*

[4] It goes without question, of course, and appellant has not contended otherwise, that the regulation can not impose a standard broader than that imposed by this statute.

442 U.S. 256, 279 ("'Distriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.'") (citation and footnote omitted); *Lora, supra*, at 250 (" . . . 'foreseeable result' . . . standing alone is not sufficient to establish the requisite discriminatory intent . . .," *citing Columbus Board of Ed. v. Penick*, 443 U.S. 449, 462 (1979)). An illegal intent to discriminate cannot be posited solely upon a mere failure to equalize an apparent disparate impact.

Nor do we believe that appellant's allegations under her § 1983 claims that defendants acted "arbitrarily and invidiously . . . in violation of the Fourteenth Amendment" are sufficient. These claims were dismissed by the district court after its original hearing because of appellant's failure to allege sufficient state action. The dismissal was affirmed by this court and appellant failed to seek review in the Supreme Court. The statements in these claims, therefore, are inapplicable to appellant's separate claims under Title IX. Even if the language were applicable, however, we would still find it inadequate. Notwithstanding the liberal pleading requirements of Fed. R. Civ. P. 9(b), the generic "arbitrary and invidious" language does not incorporate any necessary implication of intentional discrimination, and we agree with the district court that the allegation that the policies were "in violation of the Fourteenth Amendment" is nothing but a legal conclusion. *Plate v. Shepard*, 446 F.2d 1239, 1244 (6th Cir. 1971). In short, appellant has alleged nothing more than that a facially neutral age policy had a disparate impact upon women due to the domestic role they have traditionally assumed prior to continuing their education. No allegations have been made from which it can be inferred that it was more likely than not that discriminatory considerations were involved in the defendant's actions. *Compare, Daye v. Harris*, ... F.2d ....., (No. 79-2371, D. C. Cir., Jan. 15, 1981). The disparate effect alone, even if established, would not warrant relief under Title IX. The district court therefore was correct in dismissing appellant's complaint for failure to state a claim.

V

For the reasons stated previously, the district court's dismissal of appellant's complaint is affirmed. In doing so, we express no opinion on the defendants' alternative argument that the record as it presently exists establishes a sufficient legitimate explanation for appellant's rejection to avoid liability even under the disparate impact standard. Although the defendants' argument is persuasive on this issue, we need not now venture into areas the district court found no need to investigate.

AFFIRMED.

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No. 81-45

In the
Supreme Court of the United States
OCTOBER TERM, 1980

In re GERALDINE G. CANNON,
Petitioner.

JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF CHICAGO, ET AL. AND NORTHWESTERN UNIVERSITY, ET AL. IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS

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Petitioner Geraldine G. Cannon asks this Court to issue a writ of mandamus to the United States Court of Appeals for the Seventh Circuit based on her contention that the Court of Appeals, in its opinion issued May 6, 1981,[1] affirming the dismissal of her complaints for failure to state a claim, had " 'disobey[ed] and mistake[n] the meaning' of this Court's mandate" issued in No. 77-926, *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979). Specifically, Mrs. Cannon argues that this Court's ruling that she was entitled to assert a private right of action under Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.,* precluded the District Court and the Court of Appeals on remand from considering any

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[1] *Cannon* v. *University of Chicago,* 648 F.2d 1104 (7th Cir. 1981). A copy of the Court of Appeals' opinion is attached to the Petition at 1a.

other deficiencies in her statement of claim; that the courts below, therefore, could not grant Respondents' motions to dismiss under Fed.R.Civ.P. 12 (b)(6) based upon her failure to plead an essential element of a Title IX action: namely, that Respondents had acted with the purpose and intent of denying her admission to medical school because of her sex.

Respondents The University of Chicago, Northwestern University, and their respective medical school admissions officials respectfully submit that the decision of the Court of Appeals was fully consistent with this Court's mandate and that Petitioner's request should be denied for the reasons set forth herein.

STATEMENT OF THE CASE

Geraldine G. Cannon applied for admission to the September, 1975 entering classes at the medical schools of The University of Chicago and Northwestern University. She was not offered admission to either institution.[2]

On July 18, 1975, she filed her complaint against The University of Chicago and various of its officials, alleging that their failure to admit her violated the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871 (42 U.S.C. §1983), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 *et seq.*), and the Illinois prohibition against age discrimination (Ill. Rev. Stat., ch. 48, §884 *et seq.*). On August 4, 1975, Mrs. Cannon filed a nearly-identical complaint against Northwestern University and certain of its officials.

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[2] Mrs. Cannon also sought admission to eight other medical schools in 1975 and was not admitted to any of them (Transcript of Proceedings on Plaintiff's Application for a Preliminary Injunction, September 21, 1979, at 74-75).

Subsequently each Defendant moved to dismiss the complaints for failure to state a claim and lack of subject matter jurisdiction, arguing, with respect to her Title IX claims, that the Education Amendments of 1972 do not provide for a private right of action. On September 11 and October 3, 1975, those motions were granted. Mrs. Cannon filed an Amended and Supplemental Complaint in each case, repeating her claims under Title IX and the other statutes. The universities once again moved to dismiss the complaints for failure to state a claim and lack of subject matter jurisdiction. On January 15, 1976, the District Court granted the motions, ruling, with respect to Mrs. Cannon's claims under Title IX, that, "[W]hile the statute provides for judicial review of agency action, it does not authorize a private right of action against the University." *Cannon* v. *University of Chicago,* 406 F.Supp. 1257, 1259 (N.D. Ill. 1976).

On appeal, the Court of Appeals for the Seventh Circuit affirmed the judgment in its entirety. *Cannon* v. *University of Chicago,* 559 F.2d 1063 (7th Cir. 1976). The dismissal of Plaintiff's Title IX claims was upheld because the Court of Appeals concluded, "It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act." (559 F.2d at 1073).

Mrs. Cannon's petition for a writ of certiorari raised only one issue:

> "Whether section 901 of Title IX, Public Law 92-318, 20 U.S.C. §1681, which prohibits discrimination on the basis of sex in education programs receiving federal financial assistance, is enforceable in a federal civil action by an individual." (Petition for Writ of Certiorari, *Cannon* v. *University of Chicago,* No. 77-926, at 3).

On December 14, 1979, this Court reversed. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). This Court noted at the outset that the Seventh Circuit had held that Plaintiff "has no right of action against respondents that may be asserted in a federal court" and that certiorari had been granted "to review *that* holding." (441 U.S. at 680; emphasis added). This Court concluded that "[P]etitioner does have a statutory right to pursue her claim that respondents rejected her application on the basis of her sex." (441 U.S. at 689). The cases were remanded to the Court of Appeals and then the District Court "for further proceedings consistent with this opinion." (*Id.* at 717).

Each of the universities thereupon filed new motions to dismiss the Amended and Supplemental Complaints in the District Court for failure to state a claim upon which relief may be granted.[3] The basis for the motions was that, although Mrs. Cannon had a private right of action under Title IX, she had failed to allege an essential element of such a cause of action: *viz*, that the universi-

[3] Northwestern University also filed an alternative motion for summary judgment, and The University of Chicago renewed its motion for summary judgment that had been pending since before the initial appeal. Supporting affidavits from The University of Chicago disclosed that there were "at least 2,000 [applicants not offered admission] who had better academic qualifications than did Mrs. Cannon." Affidavits submitted by Northwestern established that "several thousand applicants who were as well or better qualified for admission were also rejected." Thus, the universities contended that Mrs. Cannon could not carry her burden of demonstrating that her rejection was in any way caused by her sex or that she had suffered any injury as a result of any unlawful conduct. The District Court never had occasion to reach these motions because it granted the alternative motions to dismiss.

ties had acted with the purpose and intent of discriminating against her because of her sex. Ruling on these motions was stayed while Mrs. Cannon was granted an emergency six-day hearing on her application for a preliminary injunction, which was denied by the District Court on October 2, 1979. This denial was affirmed by the Court of Appeals on April 25, 1980.[4] The universities then renewed their still-pending motions to dismiss before the District Court. On May 23, 1980, the Court granted the motions and dismissed the Amended and Supplemental Complaints for failure to state a claim.

On appeal, the Court of Appeals affirmed.[5] *Cannon* v. *University of Chicago*, 648 F.2d 1104 (7th Cir. 1981). The Court first considered and rejected the identical argument made by Petitioner here:

> "Applicant asserts that because the [Supreme] Court reversed the prior dismissal of her complaints granted on the ground that she failed to state a claim, the Court implicitly found her complaints to be adequate for the purposes of all further Rule 12(b)(6) motions.
>
> "This contention may quickly be dismissed. The only issue before the Supreme Court on the prior appeal in this case was whether Title IX implied a private right of action. The Court did not consider any other potential ground for dismissal of appellant's

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[4] *Cannon* v. *University of Chicago*, No. 79-2207 (7th Cir., April 25, 1980). The Court of Appeals also denied Plaintiff's Petition for Emergency Writ of Mandamus (*Cannon* v. *Hoffman*, No. 79-2117 (7th Cir., October 16, 1979)) and Application for Extraordinary Writ or Rule Nisi (*Cannon* v. *Parsons*, No. 79-2118 (7th Cir., October 16, 1979)).

[5] Prior to filing her appeal, Mrs. Cannon filed another Petition for Emergency Writ of Mandamus, which the Court of Appeals denied on May 30, 1980. *Cannon* v. *Hoffman*, No. 80-1736 (7th Cir., May 30, 1980).

complaints in its opinion. This was made clear in the opinion of Justice Stevens for the Court:

> Accepting the truth of [appellant's] allegations for the purposes of its decision, the Court of Appeals held that petitioner has no right of action against respondents that may be asserted in the federal court. 559 F.2d 1063. We granted certiorari to review that holding. 438 U.S. 914, 98 S. Ct. 3142, 57 L.Ed. 2d 1159.

Cannon v. *The University of Chicago*, 441 U.S. 677, 680, 99 S. Ct. 1946, 1949, 60 L. Ed. 2d 560 (1980) (footnote omitted). The fact that the Supreme Court and this court assumed *arguendo* the sufficiency otherwise of appellant's complaints for the purposes of the prior appeal does not disallow the appellees' attack on those assumptions here." (648 F.2d at 1106).

The Court of Appeals then ruled that the District Court had correctly interpreted Title IX as prohibiting only purposefully discriminatory acts and had correctly dismissed Mrs. Cannon's complaints because of their failure to allege that her applications to the medical schools of The University of Chicago or Northwestern University were purposefully or intentionally rejected because of her sex. (648 F.2d at 1109).[6]

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[6] In view of its affirmance of the District Court's dismissal for failure to state a claim, it was not necessary for the Court of Appeals to consider the universities' alternate contention that they were entitled to summary judgment. Nonetheless, the Court of Appeals noted that "defendants' argument is persuasive on this issue." (648 F.2d at 1110).

REASONS FOR DENYING THE PETITION FOR WRIT OF MANDAMUS

1. The Court of Appeals Did Not Disobey the Mandate of this Court in Affirming the Dismissal of Petitioner's Complaints for Failure to State a Claim.

Petitioner's Title IX claims were originally dismissed by the District Court solely on the threshold basis that Title IX did not provide for a private right of action. *Cannon* v. *University of Chicago*, 406 F.Supp. 1257, 1259 (N.D. Ill. 1976). The Court of Appeals affirmed the dismissal also on that ground. *Cannon* v. *University of Chicago*, 559 F.2d 1063, 1073 (7th Cir. 1976). This Court expressly stated that its grant of certiorari was "to review *that* holding." *Cannon* v. *University of Chicago*, 441 U.S. 677, 680 (1979) (emphasis added).

For the purposes of determining the existence of a private right of action, this Court observed that the universities' motions to dismiss admitted *arguendo* that Mrs. Cannon had been denied admission to the medical schools because of her sex. (441 U.S. at 680). Thus, in order to frame the question before it, the Court and the parties assumed that Plaintiff had properly pleaded and in fact could prove that she had been the victim of sex discrimination as defined in Title IX.

Nowhere in the Court's opinion was there any ruling that Plaintiff's Amended and Supplemental Complaints sufficiently alleged the essential elements of a Title IX violation. However, Justice Powell in his dissenting opinion (441 U.S. at 748 n. 19) did refer to the elements of such a claim.

> "If Title IX prohibits only purposeful discrimination such as would violate the Constitution were state action involved, a conclusion that seems foregone

> in light of our holding with respect to Title VI of the Civil Rights Act of 1964 in *Regents of the University of California* v. *Bakke*, [438 U.S.] at 284-287 (opinion of Powell, J.); *id.*, at 328-350 (opinion of Brennan, White, Marshall, and Blackmun, JJ.), then the chances of petitioner's proving that the neutral age requirements used by Chicago and Northwestern are unlawful seem infinitesimal."

The sole concern of the Court was whether a private right of action existed. The Justices left it for the lower courts to determine whether Plaintiff's allegations, if proven, would make out a prima facie case.

Consequently, the District Court and the Court of Appeals below properly considered the universities' renewed motions to dismiss and addressed the sufficiency of Petitioner's Title IX allegations. Petitioner's contention that the courts below have "'disobey[ed] and mistake[n] the meaning' of this Court's mandate" (Petition, at 5) is without foundation, and Respondents submit her Petition should be denied.

2. The Court of Appeals Properly Affirmed the Judgment of the District Court Dismissing Petitioner's Complaints because of Her Failure to Allege Purposeful Discrimination by Respondents.

a. Title IX Prohibits Only Purposefully-Discriminatory Conduct.

The Court of Appeals was clearly correct in its holding below that:

> "a majority of the Justices on the Supreme Court as well as other courts that have recently addressed this question in similar circumstances would hold that a violation of Title VI requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation. We shall

therefore adopt that standard under Title IX and evaluate appellant's complaint accordingly." (648 F.2d at 1109).

This Court has established that Title IX was modeled after and must be interpreted consistent with Title VI of the Civil Rights Act of 1964. *Cannon* v. *University of Chicago, supra,* 441 U.S. at 694-709. At least seven members of this Court have recognized that Title VI and, hence Title IX, embodies the constitutional standard of discrimination. *See Regents of the University of California* v. *Bakke,* 438 U.S. 265, 284-287 (1978) (opinion of Powell, J.); *id.,* 438 U.S. at 328-350 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *Cannon* v. *University of Chicago, supra,* 441 U.S. at 748 n. 19 (opinion of Powell J., dissenting on other grounds); *Board of Education* v. *Harris,* 444 U.S. 130, 160 (1979) (opinion of Stewart, Powell, and Rehnquist, JJ., dissenting on other grounds); *Fullilove* v. *Klutznick,* 448 U.S. 448, 517 n.1 (1980) (opinion of Marshall, Brennan, and Blackmun, JJ., concurring).[7] As the Court of Appeals observed below, decisions of the lower courts issued after *Bakke* have reached the same conclusion. *Cannon* v. *University of Chicago, supra,* 648 F.2d at 1108-09.

This Court has repeatedly held that the constitutional standard of discrimination requires "[p]roof of discriminatory intent or purpose." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S 252,

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[7] In view of these decisions, it is clear that this Court's decision in *Lau* v. *Nichols,* 414 U.S. 563 (1974), insofar as it holds that Title VI prohibits disparate impact-based discrimination, is no longer viable, as four members of the Court noted in *Bakke,* 438 U.S. at 352 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Contentions that a neutral law or policy has a disproportionately adverse effect on a racial minority or women do not state a violation of the constitutional standard of discrimination, even where such an effect can be anticipated. *See Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272, 278-79 (1979).

Consequently, the Court of Appeals correctly determined that Petitioner, in order to state a claim under Title IX, had to allege that she was the victim of purposefully-discriminatory conduct.

b. Petitioner's Complaints Were Properly Dismissed because They Contained No Allegations that She Was the Victim of Purposefully-Discriminatory Conduct.

The Court of Appeals correctly determined after its review of Petitioner's complaints that "appellant's cause of action was based solely upon the alleged disparate impact the defendants' age policies had upon women." (648 F.2d at 1109).

The material portion of her identically-worded complaints against The University of Chicago and Northwestern University alleged simply:

> "A material criterion for defendants' denial of plaintiff's application for admission to the September, 1975 entering class at Northwestern Medical School was her age which, in the circumstances of application to medical school, is a criterion disproportionately characteristic of her sex and does not validly predict any lack of success in the education program or activity of the school. This conduct on the part of defendants is in violation of the Civil Rights Act of 1964 . . . as amended by Title IX of the Education Amendments of 1972. . . ." (648 F.2d at 1109).

The District Court granted Respondents' motions to dismiss because, in the court's words, "there are no allegations remotely approaching the purposeful or intentional sex discrimination required to state a claim under Title IX." Rather than moving to amend to correct the deficiency, Petitioner elected to stand on her complaints and appealed, arguing primarily that no such purposefully-discriminatory conduct was required to make out a violation of the statute.[8] The Court of Appeals' construction of Petitioner's allegations was manifestly correct and provides no basis for the issuance by this Court of the petitioned-for writ.[9]

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[8] She argued alternatively that she had satisfied Title IX's pleading requirements with her allegations that the universities had acted "arbitrarily and invidiously," a contention the Court of Appeals properly rejected. (648 F.2d at 1110).

[9] In her petition, Mrs. Cannon states that, "Throughout this litigation, petitioner has sought to prove that the purpose of the schools' age policies was to exclude women and that she was excluded 'because of her sex.'" (Petition, at 9). Petitioner's effort to rewrite history is clearly in error. Her position throughout this case has been that Title IX and the regulations issued by HEW thereunder are violated by facially-neutral policies that have a disparate effect on women and are not predictive of academic success regardless of the purpose for which the policies were adopted.

Petitioner's inability to allege the requisite purposeful conduct as defined in this Court's decisions was clearly demonstrated in the Summary Outline of Position that she submitted to the Court of Appeals in support of her Motion to Amend Complaints or, in the Alternative, to Extend Time for Filing a Petition for Rehearing and Suggestion for Clarification:

> "[P]laintiff consistently has contended that defendants applied their age policies to plaintiff with the intent

CONCLUSION

Respondents The University of Chicago, *et al.* and Northwestern University, *et al.* pray that this Court will deny Petitioner's Petition for Writ of Mandamus for the reasons set forth herein.

Respectfully submitted,

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[9] (Continued)

> — in the sense of voluntariness with an awareness of the consequences on women such as plaintiff who have interrupted education or a career in favor of motherhood — and for the purpose — in the sense of intent as aforesaid and the absence of any legitimate purpose sufficient to justify the discriminatory effect of such age policies on women as an incidental or unavoidable side effect — of discriminating against women."

This construction of the constitutional standard of discrimination was advanced and rejected in *Feeney*, which held that motivation, not forseeability, is the proper test. (442 U.S. at 278-79).

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Respondents The University of Chicago, *et al.* and Northwestern University, *et al.*, Defendants-Appellees in the underlying action before the United States Court of Appeals for the Seventh Circuit,* jointly oppose the Motion to Expedite Consideration filed by Petitioner Geraldine G. Cannon.

*In its opinion issued May 6, 1981, the Court of Appeals affirmed the dismissal by the District Court of Petitioner's complaints against the universities' medical schools for failure to state a claim. *Cannon v. University of Chicago,* ..... F.2d ....., No. 80-1763 (7th Cir. 1981). A copy of the Seventh Circuit's opinion is attached as an appendix to the petition filed with the Motion to Expedite Consideration.

Petitioner requests the Court to expedite its consideration of her Petition for Writ of Mandamus

> "so that, if the petition is granted, a hearing on the merits of her related civil rights claim may be held in the district court prior to the commencement of the next entering medical school class at Northwestern University on September 21, 1981, and at The University of Chicago on October 23, 1981." (Motion to Expedite Consideration, at 2).

Thus, Petitioner requests this Court to take the extraordinary step of deciding the merits of her petition during recess, prior to the commencement of the October, 1981 term, only as a predicate to a further hearing before the District Court on the merits of her claim that she was the victim of sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §1861 *et seq.* The motion should be denied for several reasons.

First, there is no basis for believing that, even with expedited consideration of her petition by this Court, Petitioner would have any likelihood of prevailing before this Court, obtaining an emergency hearing on her claims before the District Court, and prevailing on those claims prior to the commencement of the fall 1981 terms. The Court of Appeals carefully considered and rejected the very contention that Petitioner raises as the question in her petition here. Her Petition for Rehearing and Suggestion for Rehearing in Banc, which presented the same argument, was denied with no judge in active service even requesting a response. As Respondents will demonstrate when they file their joint response to the petition, Petitioner's effort to find error in the Court of Appeals' decision is without merit.

Moreover, if these cases were to be remanded to the District Court, Petitioner would still have to prevail on the long-pending motions for summary judgment that Respondents filed with their motions to dismiss. The District Court did not reach these motions, dismissing the complaints instead for failure to state a claim. Respondents subsequently requested the Court of Appeals to grant them summary judgment in the event it found Petitioner's complaints to be legally sufficient. The Court of Appeals, in affirming, had no need to pass on the motions for summary judgment. However, the Court did note that "the defendants' argument is persuasive on this issue." (Petitioner's App., at 13a). Thus, there is virtually no likelihood that expedited consideration by this Court would result in the ultimate relief Petitioner seeks.

Further, expedited consideration by this Court should be denied because Petitioner has already had a hearing on the merits of her underlying claims and has not prevailed. The District Court heard evidence on Petitioner's motion for a preliminary injunction on September 21, 24, 26, 27, and 28, and October 2, 1979. At the close of Petitioner's presentation, the District Court denied her motion. (A copy of the District Court's October 22, 1979 Findings of Fact, Conclusions of Law, and Order are attached hereto as Exhibit A.) The Court of Appeals affirmed this denial. (A copy of the Court of Appeals' April 25, 1980 Order in *Cannon* v. *University of Chicago*, No. 79-2207, is attached hereto as Exhibit B.) Thus, she has already had one opportunity to present her evidence in support of an emergency, interlocutory injunction and did not prevail.

Finally, expedited consideration and disposition during this Court's recess ought to be reserved for truly extra-

ordinary cases. Petitioner will suffer at most only a single year's delay in admission to medical school. Expedited consideration is simply inappropriate here.

Respectfully submitted,

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EXHIBIT A

In the

United States District Court

For the Northern District of Illinois

EASTERN DIVISION

GERALDINE G. CANNON,

Plaintiff,

v.

THE UNIVERSITY OF CHICAGO, et. al.

Defendants.

No. 75 C 2402

GERALDINE G. CANNON,

Plaintiff,

v.

NORTHWESTERN UNIVERSITY, et. al.

Defendants.

No. 75 C 2724

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

These matters having been consolidated solely for the purpose of hearing plaintiff's motion for preliminary injunction; and plaintiff having presented evidence in support of said motion in open court on September 21, 24, 26, 27 and 28, and October 2, 1979, and defendants having moved at the close of plaintiff's proof for the entry of an order denying

her motion for a preliminary injunction; the Court, pursuant to *Rule 52* of the *Federal Rules of Civil Procedure*, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff is a 44 year old woman, married and the mother of five children.

2. Plaintiff took some undergraduate college courses in connection with her nursing education at St. Francis School of Nursing and licensing as a Registered Professional Nurse in Illinois in the 1950's. In 1972 she resumed her undergraduate studies at Trinity College in Deerfield, Illinois.

3. In May, 1975 Plaintiff obtained an A.B. degree *cum laude* from Trinity College, with a major in biology.

4. In October, 1974, prior to obtaining her undergraduate degree, plaintiff took the Medical College Admission Test (MCAT) and achieved the following test scores: science-585, quantitative ability-525, verbal ability-605, general information-625; for an average total MCAT score of 585.

5. In October, 1974 plaintiff applied for admission to the 1975-1976 entering class at ten medical schools including the Pritzker School of Medicine at the University of Chicago and the Northwestern University Medical School, both of which were receiving federal financial assistance at all times pertinent hereto.

6. In connection with her applications, plaintiff consulted certain booklets published by the Association of American Medical Colleges which contained information with respect to the defendant medical schools. As to the University of Chicago, one booklet stated:

"Applicants over 30 without advanced degrees and foreign citizens without at least one year of completed studies in an American school are not encouraged to apply.

With respect to Northwestern University, the foregoing booklets stated:

"Applicants over 30 years of age are at a disadvantage."

"Few applicants above the age of 30 are considered; the absolute age limit is 35."

7. When she submitted her application for admission, the plaintiff was 39 years of age.

8. Plaintiff was one of more than 5,400 persons who applied for 104 available positions in the 1975-1976 entering class at the University of Chicago. An estimated 7,550 persons applied for approximately 170 available positions in the 1975-1976 entering class at Northwestern University, 60 of which were admitted from the Northwestern University Honors Program in Medical Education.

9. Plaintiff's applications for admission disclosed that at the time of her application she had received a grade point average of 3.17 in her undergraduate science courses, a cumulative grade point average of 3.46, and MCAT test scores as set forth in Finding 4 above. Plaintiff subsequently submitted information indicating that she achieved a final cumulative undergraduate grade point average of 3.53 and pointed out that the average of her MCAT test scores was 585.

10. Plaintiff's applications for admission to the 1975-1976 entering classes at the defendant medical schools were rejected although she met all of the formal requirements or prerequisites for admission such as undergraduate training and completion of the MCAT test.

11. Plaintiff's objective credentials in terms of her grade point average in undergraduate science courses and her MCAT test scores in the areas of science and quantitative ability were inferior to those presented by approximately 1,900 other persons who were denied admission to the 1975-1976 entering class at the University of Chicago. The Dean of Admissions testified that her application was rejected solely on the basis of such objective credentials.

12. Plaintiff presented no proof with respect to her relative standing among the large group of persons who applied for and were denied admission to the 1975-1976 entering class at Northwestern University nor the reasons why her application was rejected.

13. In addition to the defendant medical schools, plaintiff applied for and was denied admission to the 1975-1976 entering classes at the Chicago Medical School, Loyola University of Chicago Strich School of Medicine, Southern Illinois University School of Medicine, the Medical School at the Mayo Clinic, Rush Medical School, the Medical Schools of the University of Illinois, the University of Minnesota at Minneapolis and the University of Nebraska Medical School.

14. There is no evidence that defendants discriminated against the plaintiff on the basis of her sex, either purposefully or otherwise, in rejecting her applications for admission.

15. There is no evidence that any admission policy or practice of the defendant medical schools had a disparate impact upon women generally, upon women who applied to the defendant medical schools, or upon women who were interested in applying to the defendant medical schools but who did not in fact do so.

16. Certain observations made by one of plaintiff's witnesses, Professor Edwin C. Lewis, based largely upon his review of unidentified studies conducted by others and upon his experience as a counseling psychologist at Iowa State University in Ames, Iowa, with respect to the effect of "selection policies" upon women who are interested in attending graduate schools, are entitled to little if [any] weight. In any event, such observations have little probative value to the narrow issues raised by plaintiff's motion for a preliminary injunction.

17. Plaintiff has failed to show that she would have been admitted to the defendant medical schools but for the policies and practices which she challenges in this proceeding.

18. There is nothing in the record to show that any injury plaintiff might suffer outweighs the disruption which would be caused to the defendants and to their educational programs if the court were to grant plaintiff's request for preliminary injunctive relief.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the parties and of the subject matter. *Cannon* v. *University of Chicago*, ... U.S. ....., 60 L.Ed.2d 560 (1979).

2. Plaintiff seeks the entry of a mandatory preliminary injunction compelling the defendant medical schools to admit her to their 1979-1980 entering class.

3. A preliminary injunction is one that issued to protect a plaintiff from irreparable injury and, more importantly, to preserve the court's power to render a meaningful decision after a trial on the merits. *Meis* v. *Sanitas Service, Inc.*, 511 F.2d 655 (5th Cir. 1975).

4. The purpose of a preliminary injunction is to preserve the status quo. *South East Chicago Commission* v. *Department of Housing and Urban Development*, 488 F.2d 1119 (7th Cir. 1973); *Westinghouse Electric Corporation* v. *Free Sewing Machine Company*, 256 F.2d 806 (7th Cir. 1958).

5. *Rule 65* of the *Federal Rules of Civil Procedure* empowers a court to issue a preliminary injunction but establishes no prescribed procedure for its issuance. Thus, the grant or denial of the preliminary injunction is a matter solely within the sound discretion of the district court judge. *Beneficial Finance Corporation of Wisconsin* v. *Wirtz*, 346 F.2d 340 (7th Cir. 1965); *Bath Industries* v. *Blot*, 427 F.2d 97 (7th Cir. 1970).

6. Although the granting of such a motion is discretionary, courts have established four essential elements that the plaintiff must show in order to qualify for the relief sought: that the plaintiff is likely to succeed on the merits, that the plaintiff will suffer irreparable injury unless the injunctive relief is granted, that the injury to the plaintiff outweighs any injury which the defendant would suffer if the injunction were to be entered, and that the public interest warrants the issuance of the preliminary injunction. *Electri-Flex* v. *National Labor Relations Board*, 412 F. Supp. 698 (N.D.Ill. 1976). *See also*, *Washington* v. *Walker*, 529 F.2d 1062 (7th Cir. 1976); *Banks* v. *Trainor*, 525 F.2d 837 (7th Cir. 1975).

7. Of these factors, the threat of irreparable harm is, in most cases, considered to be the most important factor to be considered by the court. A failure to show irreparable harm will result in the denial of the injunctive relief. *Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973); *American Medical Association* v. *Weinberger*, 522 F.2d 921 (7th Cir.

1975). Under *Rule 65*, this requires more than a mere showing that the plaintiff will see his relative position deteriorate. *Sanders* v. *Airline Pilot's Association International*, 473 F.2d 244 (2nd Cir, 1972).

8. In a case such as this one, where both plaintiff and defendants could suffer harm, it becomes even more important for the court to be convinced beyond doubt that the plaintiff is entitled to the extraordinary relief of a preliminary injunction. The law and the facts must be clearly in the favor of the moving party. *Valentine* v. *Indianapolis-Marion County Building Authority*, 355 F.Supp. 1240 (N.D.Ind. 1973).

9. The burden of persuasion in a preliminary injunction case is always upon the plaintiff and may not be shifted to the defendant in any way. *Canal Authority of Florida* v. *Callaway*, 489 F.2d 567 (5th Cir. 1974).

10. The court is being asked to exercise a very far-reaching power, a power that should never be indulged in except in the clearest of cases. *See, Lee* v. *Resor*, 348 F.Supp. 389 (N.D.Fla. 1972).

11. The sole basis for plaintiff's complaints and motion for a preliminary injunction is *Title IX* of the *Education Amendments of 1972, 20 U.S.C. § 1681 et. seq.*, which provedes in part that no person shall, on the basis of sex, be excluded from participation in, denied the benefit of, or be subjected to discrimination under certain described educational programs and activities, including the programs and activities conducted by each defendant medical school.

12. The parties are in disagreement as to what plaintiff must prove in order to succeed on the merits of her *Title IX* claim. Plaintiff urges that her *prima facie* claim for relief can be established by showing that the admission policies

and practices of the defendant medical schools have a disparate impact upon women and have not been shown validly to predict success in the education program or activity in question. Defendants urge that plaintiff has the burden of showing that defendants purposefully discriminated against her on the basis of sex. It is unnecessary for the court to resolve that matter at this time as neither showing has been made.

13. The court cannot deny the probative value of evidence that a policy alleged to exist in the admission procedures of both defendant medical schools had a disparate impact upon women in light of numerous recent Supreme Court discisions. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts* v. *Feeney*, 99 S.Ct 2282 (1979). However, the competent evidence admitted on the issue was insufficient to warrant the issuance of a preliminary injunction.

14. Moreover, in view of the large number of competing applicants who were also denied admission to the defendant medical schools, plaintiff failed to show that she would have been admitted but for the admission policies and practices which she challenges in this proceeding or that she suffered injury as the result of such policy or practice. *See, Henson* v. *University of Arkansas*, 519 F.2d 576 (8th Cir. 1975).

15. *The Age Discrimination Act of 1975, 42 U.S.C. § 6101, et. seq.*, to which plaintiff's counsel referred frequently during the course of the hearing on the motion for a preliminary injunction, is not properly before the court, nor was the aforesaid statute in effect at the time of the events alleged in plaintiff's complaint.

16. Under all the circumstances, plaintiff has failed to show that she is likely to succeed on the merits. *See, Cannon* v. *University of Chicago,* ..... U.S. ....., 60 L.Ed.2d 560 (1979), (statement of Powell, J., *dissenting,* at page 607, n. 19 that "plaintiff's chances of success on the merits in this case are infinitesimal").

17. Since plaintiff has failed to show that she is likely to succeed on the merits, or that any injury which she might suffer would outweigh the injury to defendants if the injunction were issued, the court cannot grant her motion. *Electri-Flex* v. *National Labor Relations Board,* 412 F.Supp. 698 (N.D.Ill. 1976); *Washington* v. *Walker,* 529 F.2d 1062 (7th Cir. 1976) and *Banks* v. *Trainor,* 525 F.2d 837 (7th Cir. 1975).

It is therefore ordered that the plaintiff's motion for the issuance of a preliminary injunction be, and the same is hereby, denied.

It is further ordered that the plainitff's objections to the defendants' proposed findings of fact and conclusions of law, which were filed on October 11, 1979, are sustained insofar as the plaintiff's amended findings of fact and conclusions of law have been incorporated herein. In all other respects, the plaintiff's objections are overuled.

Entered this 22nd day of October, 1979.

s / Julius J. Hoffman

SENIOR UNITED STATES
DISTRICT COURT JUDGE

EXHIBIT B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

ARGUED APRIL 8, 1980

April 25, 1980

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

GERALDINE G. CANNON,

Plaintiff-Appellant,

No. 79-2207

vs.

THE UNIVERSITY OF CHICAGO, et al., and
NORTHWESTERN UNIVERSITY, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 75-C-2402, 75-C-2724
Julius J. Hoffman, *Judge.*

ORDER

Plaintiff-appellant Geraldine G. Cannon appeals from the denial of a preliminary injunction mandating her admission to the 1979 entering class of the medical schools of defendants,

The University of Chicago and Northwestern University. Plaintiff's complaint alleged that she was excluded from participation in the defendants' medical education programs on the basis of sex in violation of Title IX of the Education Amendment of 1972. Upon remand after the Supreme Court's decision in *Cannon* v. *The University of Chicago*, ... U.S. ..... (1979), the district court conducted an evidentiary hearing on the motion for a preliminary injunction. At the close of plaintiff's case, the motion was denied.

In *Kolz* v. *Board of Education*, 576 F.2d 747 (7th Cir. 1978), this court reiterated several axiomatic requirements for the granting of a preliminary injunction. The plaintiff "must establish a reasonable probability of success on the merits, irreparable injury, the lack of serious adverse effect on others, and sufficient public interest." *Id.* at 748-49 (citation omitted). The district judge weighed these factors and concluded that Ms. Cannon failed to make the necessary showings to warrant the grant of a preliminary injunction. In reviewing that decision, we cannot say that the findings were clearly erroneous nor that an abuse of discretion has otherwise been shown.

Our holding, of course, intimates nothing concerning the merits of Cannon's case, which we presume will be developed more fully in the hearing on a permanent injunction in the district court.

Accordingly, the judgment appealed from is affirmed.

No. 81-45

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

In re GERALDINE G. CANNON,

Petitioner.

REPLY TO THE JOINT RESPONSE IN OPPOSITION
TO PETITIONER'S MOTION TO EXPEDITE CONSIDERATION
OF THE PETITION FOR A WRIT OF MANDAMUS

1. Petitioner brought suit to redress denial of admission to the 1975 classes of the respondent schools. The schools' Joint Response now asserts that petitioner "will suffer at most only a single year's delay" if her Motion to Expedite Consideration is denied. (p.4). In October, 1979, they persuaded the district court to deny a preliminary injunction -- in "most important" part because the harm to petitioner in missing the 1979-80 school year would not "outweig[h] the disruption which would be caused to [the schools]." (Jt.Resp. Ex.A. pp.5-7,9, Finding 18, Conclusions 6-10,17). At that time, the Department of Health, Education and Welfare had just required all federally-assisted medical schools to "disrupt" their age policies. See, 44 Fed.Reg. 33773 (June 12, 1979) implementing the Age Discrimination Act of 1975, 42 U.S.C. §6101 et seq. In fact, both schools promptly abolished their age policies for all future classes. Repeated denial of timely relief for procedural reasons, because "only" one additional year is

involved, clearly would undermine this Court's 1979 holding that "petitioner may maintain her lawsuit" for the 1975 class. 441 U.S. at 717.

2. Although demonstrating a probability of success on the merits is required in order to obtain a preliminary injunction, that standard has no application to the motion now before the Court. Unless the pending motion is granted, the merits of the petition and the substance of petitioner's underlying civil rights claim will not be considered at all until after she has been delayed for a seventh full academic year.

Accordingly, this Court should expedite consideration of the Petition for a Writ of Mandamus. If the petition is granted, a meaningful hearing on the substantive merits of her civil rights claim can be held in the district court prior to the start of the next medical school class -- at Northwestern University on September 21, 1981, and at the University of Chicago on September 23, 1981.

Respectfully submitted,

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FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In *re* GERALDINE G. CANNON,

Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER TO THE NON-JUDICIAL RESPONDENTS

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No. 81-45

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

In re GERALDINE G. CANNON,

Petitioner.

On Petition for a Writ of Mandamus
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF OF PETITIONER TO THE NON-JUDICIAL RESPONDENTS

Three arguments first raised in the schools' joint brief in opposition to the petition for a writ of mandamus, when properly clarified or corrected, demonstrate that the petition should be granted by summary action.

1. This Court clearly stated that the facts alleged in the complaints establish a violation of Title IX.

The schools say that "[n]owhere in the Court's opinion is there any ruling that [the complaints] sufficiently alleged the essential elements of a Title IX violation." (Jt. Br. Op. p.7). On the contrary; the opinion of the Court stated:

> "Only two facts alleged in the complaints are relevant to our decision. First, petitioner was excluded from respondents' medical education programs because of her sex. Second, these programs were receiving federal financial assistance at the time of her exclusion. These facts, admitted arguendo by respondents' motion to dismiss the complaints, establish a violation of §901(a) of Title IX." Cannon v. University of Chicago, 441 U.S. 677, 680 (1979).

Only then did the Court proceed to the question of whether petitioner could maintain her lawsuit to remedy that violation. "[T]he fact that a federal statute has been violated and some per-

son harmed does not automatically give rise to a private cause of action in favor of that person." 441 U.S. at 789./1

2. The schools' statement of the case is factually misleading.

Two references to factual matters in conflict with the allegations of the complaints as to petitioner's academic qualification are not only irrelevant on a motion to dismiss, but also misleading.

/1 In view of the constitutional case or controversy limitation on advisory opinions, prior consideration of the "sufficiency otherwise" of the complaints in stating a Title IX violation was a most appropriate, if not an absolutely necessary, subsidiary question within Rule 21.1(a). No basis or support whatever is asserted for the schools' novel claim that this Court assumed petitioner had properly pleaded that she had been the victim of sex discrimination as defined in Title IX. (Jt. Br. Op. p.7). The opinion of the Court assumed only the truth of the facts alleged in the complaints. 441 U.S. at 680. The opinion expressed no assumption at all as to what petitioner had alleged in the complaints.

(Jt. Br. Op. p.2 n.2, p.4 n.3)./2

The eight other schools to which petitioner applied all had age limits precluding her admission. At one, Chicago Medical, her test scores were higher than 101 of the 117 students admitted.

Argument that 2,000 or more applicants with better qualifications were rejected by each respondent school is based solely on the lowest subcategories of petitioner's academic qualifications. (Berry Affid. 8/14/79; Richards Affid. 9/7/79). These were not the academic selection criteria published by the schools, and no explanation was asserted for the disavowal of the published criteria implicit in the offer of such

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/2 Both the district court and the court of appeals expressly refused to reach the schools' alternative motions for summary judgment.

statistics. Ibid. Even on those terms, Chicago admitted four applicants with lower qualifications in 1975; and Northwestern, seven. Ibid.

Petitioner met all of the published selection criteria for each school -- other than age. (Assoc. Amer. Med. Colleges). Her overall grades and test scores were higher than at least 30% of those admitted at Chicago and Northwestern in 1975. Ibid. Her grades and science subtest score gave her an approximately 70% chance of admission. Ibid.

3. This Court's opinion is compatible with every applicable standard.

The schools argue that Title IX embodies the constitutional standard of discrimination, and that the complaints fail to allege that petitioner was the victim of purposeful discrimination. (Jt. Br. Op. pp.8-12). This is no more than an indirect argument that, if their

claim as to the applicable standard of discrimination is correct, then this Court's opinion was wrong in stating that the facts alleged in the complaints "establish a violation of §901(a) of Title IX." On the contrary; this Court's description of petitioner's claim that she was excluded "because she is a woman" and "because of her sex", 441 U.S. at 680, is fully compatible with the definition of "discriminatory purpose" under the constitutional standard in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) -- and every lesser standard which might be applicable under Title IX, the regulation, or the the schools' federal funding contracts./3

/3 Feeney and other cases, constitutional and nonconstitutional, have held that a discriminatory effect may be justified if necessary to the accomplishment (contd.)

However, even if there were "substantial grounds not previously presented" which might cause this Court to reconsider its prior opinion, that argument may be made only in a petition for rehearing to this Court as provided in Rule 51. After remand, no lower court may properly countenance such an argument.

CONCLUSION

Now, more than two years after this Court held that she may maintain her lawsuit, petitioner should not be delayed

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73 (contd.)
of a legitimate purpose. Here, the U.S. Commission on Civil Rights and the Department of Health, Education and Welfare have established and confirmed that school administrators may not justify age limits as necessary to the operation of federally-assisted medical education programs. See Age Discrimination Study (1977), Findings Nos. 2 (p.24), 18 (p. 76), Conclusion (pp.78-81), and Recommendation No. 12 (p.101); and 44 Fed. Reg. 33773 (June 12, 1979), respectively. Both respondent schools abolished their age limits for applicants to 1980 and subsequent classes.

for a seventh year in having an opportunity to prove the merits of her civil rights claim. A writ of mandamus should issue to reverse the judgment and vacate the opinion of the court of appeals.

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August 19, 1981